

B. SECTION 4958 UPDATE

by

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1. Introduction

Section 1311 of the Taxpayer Bill of Rights 2 (P.L. 104-168, 110 Stat. 1452), enacted July 30, 1996, added IRC 4958 to the Internal Revenue Code. IRC 4958 imposes excise taxes on excess benefit transactions between disqualified persons and IRC 501(c)(3) or 501(c)(4) organizations. The excise tax, which is paid by the disqualified person, is imposed on the amount received by the disqualified person that exceeds the value of consideration provided to the organization. Section 4958 also requires correction of the excess benefit transaction or a second tier tax of 200 percent if imposed. Organization managers may also be liable for IRC 4958 excise taxes if they knowingly participate in an excess benefit transaction. Excess benefit transactions are situations where an IRC 501(c)(3) or 501(c)(4) organization is used for improper personal gain by a person in a position to exercise substantial influence over its affairs. The Section 4958 taxes are popularly known as “intermediate sanctions,” because they provide a remedy short of revocation of exempt status for transactions that constitute inurement. These excise taxes generally apply to excess benefit transactions occurring on or after September 14, 1995.

On August 4, 1998, proposed regulations under IRC 4958 were published in the Federal Register (63 Fed. Reg. 41486). On March 16 and 17, 1999, the Service held public hearings on these proposed regulations. The Service is considering the written comments received and the testimony presented, but as this article goes to press, the final regulations have not been issued.

2. Technical Advice Requests

Key District Offices and appeals offices are required to request technical advice on exempt organization cases concerning qualification for exemption for which there is no published precedent or for which there is reason to believe that nonuniformity exists. See section 4.04 of Rev. Proc. 99-5, 1999-1 I.R.B. 158, 163.

Because final regulations under IRC 4958 have not been issued and to ensure consistent analysis and application of both IRC 4958 and the proscriptions against private inurement under IRC 501(c)(3) and IRC 501(c)(4), Key District Offices have been directed to request technical advice from National Headquarters in the following situations:

- A. All cases in which an excise tax under IRC 4958 is being proposed;

- B. All cases in which an adverse action under an inurement proscription is being proposed;
- C. All IRC 4958 cases that are being considered for resolution by a closing agreement; and
- D. All private inurement cases that are being considered for resolution by a closing agreement.

Where appropriate, Key District Offices should consider using the pre-submission conference procedures described in Rev. Proc. 99-5, section 9.

3. Statute of Limitations

To permit the national office sufficient time to consider the request for technical advice, it may be necessary for the period of assessment for IRC 4958 excise taxes to be extended.

The period of limitations for assessing IRC 4958 excise taxes against disqualified persons and organization managers begins on the date the IRC 501(c)(3) or IRC 501(c)(4) organization files the information return (Form 990 or Form 990-EZ) for the tax period during which the excess benefit occurred, or on the date the information return is due, whichever is later. See IRC 6501. However, since disqualified persons and organization managers are liable for the excise taxes under IRC 4958(a), the period of assessment may be extended only by the appropriate disqualified persons and organization managers, not by the IRC 501(c)(3) or IRC 501(c)(4) organization. Therefore, district offices and appeals should obtain executed Forms 872 (Consent to Extend the Time to Assess Tax) from the appropriate disqualified persons and organization managers. See IRC 6501(c)(4).

In a situation where executed Forms 872 cannot be obtained from all appropriate disqualified persons and organization managers to permit the national office sufficient time to consider the request for technical advice, the national office should be contacted.

4. Technical Advice Guidelines

The Service has given Key District Offices the following additional guidance for technical advice requests with IRC 4958 issues.

The Key District Office should prepare separate technical advice requests for each exempt organization, each disqualified person and each organization manager who participated in an excess benefit transaction. In preparing requests for technical advice, the Key District

Office should encourage all parties to the excess benefit transaction to submit a written statement of the facts, issues, and the party's position. See Rev. Proc. 99-5, section 10.01(2).

The Key District Office should provide the organization a copy of all technical advice requests. Each disqualified person and organization manager who participated in an excess benefit transaction should be given a copy of their own technical advice request and a copy of the technical advice request of the organization with information redacted for any separate excess benefit transaction of other disqualified persons and organization managers. The facts relating to potential excess benefit transactions should be separately stated in the technical advice request with respect to the organization for ease of redaction.

Consistent with Rev. Proc. 99-5, 1999-1 I.R.B. 158, the Key District Office should invite all parties to the excess benefit transaction to any pre-submission conference. However, if the organization has participated in more than one excess benefit transaction involving different disqualified persons and different organization managers, a separate pre-submission conference should be held for the respective parties of each transaction.

Once the Key District Office receives the technical advice memoranda as described in Rev. Proc. 99-5, section 16.13, it should give the various parties their copies as provided in the transmittal memorandum:

- The Key District Office should give each disqualified person and organization manager a redacted copy of the "global" technical advice memorandum (the copy with respect to the organization) and a copy of their respective technical advice memorandum, and
- The Key District Office should give each organization the "global" technical advice memorandum and a copy of each disqualified person's and organization manager's technical advice memorandum.

In addition, since an excess benefit transaction between a disqualified person and an IRC 501(c)(3) or 501(c)(4) organization may result in a disqualified person being liable for additional income tax, the Key District Office may need to coordinate certain issues with the Examinations Division.

5. Internal Revenue Manual

We are currently preparing a new IRM chapter to address various procedural matters that may arise in IRC 4958 cases, such as period of limitations, correction, abatement, etc.